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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAIME GUZMAN, Defendant and Appellant.	B164651 (Super. Ct. No. MA 023696)

APPEAL from a judgment of the Superior Court of Los Angeles County. Howard Swart, Judge. Affirmed and remanded with directions.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Ana R. Duarte and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of the attempted murders of Jesse Ponce (count 1) and Jason Miranda (count 2), and assault with a firearm on Jesse (count 3) and Jason (count 4). (Pen. Code, §§ 187, 664, 245, subd. (a)(2).[1] The jury also found true as to all four counts that a principal was armed with a firearm. (§ 12022, subd. (a)(1)). Defendant was sentenced to a prison term of six years, consisting of the low base term of five years on count 1, plus one year for the firearm enhancement, the middle term of five years on count 2, plus one year for the enhancement, to be served concurrently with count 1, and the midterm of three years as to both counts 3 and 4, stayed pursuant to section 654.

We remand the matter so the victim restitution minute order may be corrected to conform to the court's oral pronouncement and the abstract of judgment modified to reflect the corrected order. We reject defendant's claims of insufficient evidence, instructional error and ineffective assistance of trial counsel.

BACKGROUND

On the night of December 26, 2001, Jason and Jesse were walking north on the east side of the street where Jason's former girlfriend, Tiffany Herrera, lived. Jason saw an occupied, beige Altima parked outside Tiffany's house, facing south. Tiffany, who was pregnant, ran from her house and crossed the street. She began a brief, but loud argument with Jason. Afterward, Jason and Jesse continued walking north. The Altima moved away in the opposite direction, but at some point made a U-turn. When Jason and Jesse crossed the cross street, the Altima turned onto the cross street and parked in the middle of the road just past the intersection. Jesse said, "'Look out.'" Jason turned and saw Rafael Flores, defendant's friend, outside the rear right passenger area of the Altima, shooting at them with a handgun. (Rafael was a member of the Pacoima Crazy Boys gang; defendant had claimed membership. Rafael's gang moniker was "Cartoon.") Jason saw three or four muzzle flashes. Jesse saw "sparks" from the right side of the car

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1 Additional statutory references are to the Penal Code.

and heard the gunshots. He felt bullets pass his stomach and ear. Jesse ran, but was shot twice in the leg. The area was well-lighted. The Altima was about 20 feet from Jason and Jesse when the shooting began. Jason and Jesse went over three fences and reached an adjacent street.

Later that night, deputies took Jason to a house where he identified an Altima as looking the same as the car involved in the shooting. From a photographic lineup, Jason picked defendant as the driver of the Altima. (He had seen defendant at Tiffany's house and knew he was her current boyfriend. He knew defendant's name and that he drove an Altima.)

Tiffany had become defendant's girlfriend in October 2001. Sometime thereafter, she told him she was pregnant; both assumed he was the father. After checking medical reports, Tiffany realized the baby was Jason's. On December 23, she told defendant the baby was not his, but Jason's. Defendant cried and did not speak with Tiffany for three days. On the evening of the shooting, defendant parked his Altima in front of her house and spoke with her. Tiffany suggested an abortion. Defendant disapproved, and they argued. Tiffany accompanied defendant to his car. Cartoon was in the passenger seat. Defendant drove off southbound.

As defendant and Cartoon were leaving, Tiffany saw Jason and Jesse walking north on her street. She had heard that Jason wanted her to have an abortion and he "didn't want anything to do with it."[2] She crossed the street and yelled at him for a short time before returning home.

Meanwhile, defendant made a U-turn and stopped in the middle of the street in front of Tiffany's house. He asked with whom she had been talking. She first said it was "nobody," but then said it was Jason. She answered "yes" when defendant asked if she was all right, although she was "really upset," "angry." Defendant said he was going to drop off Cartoon and would return in about 15 minutes. He drove off, northbound, and,

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2 The record does not reveal whether "it" referred to abortion, the baby, or something else.

from her porch, Tiffany heard three or four gunshots coming from the area toward which Jason and Jesse had walked.

Tiffany recounted events to the police and led them to defendant's Altima at his house. Defendant was arrested. His father told an arresting deputy his son had just come home. Defendant denied having been at Tiffany's house. Confronted with Tiffany's statement that he had been there, defendant said, "'Well, if that's what she said, then I guess I was there.'" A live .22-caliber bullet was found between mattresses in his bedroom.

Defendant had told Tiffany that Cartoon was a member of the Pacoima Crazy Boys gang. A few days before the shooting, he told her Cartoon was to be released from jail. Tiffany identified Cartoon from a photographic lineup. By the time of trial, Tiffany and Jason had resumed their relationship.

Defendant told the interviewing deputy, who dealt with gang-related crimes, that he was "mad" when he learned Tiffany was pregnant and stayed away from her for three days. He drove his parents' Altima to her house on December 26. They argued. He was alone in the car. Cartoon was a friend whom he had last seen on December 24. Gang members are reluctant to implicate other gang members lest they be labeled a "snitch" and perhaps face being killed or assaulted by their own gang.

A search of Cartoon's residence turned up a gun cleaning kit, apparently for a .38-caliber or 9-millimeter gun, and Pacoima Crazy Boys gang paraphernalia.

Another deputy testified solely as a gang expert. Pacoima Crazy Boys is a violent gang. Over time, some of them have come to Lancaster, where the gangs are less territorial because of their fewer number. A gang member wins respect by committing violent crimes. The deputy had earlier contact with Cartoon. He opined that if a gang member shot the former boyfriend of a member's girlfriend, the act promoted the gang. During gang-related crimes, when a shooting is done by a car's passenger, the driver usually knows what is about to happen. The driver is supposed to take the shooter safely away from the shooting. Appellant's tattoos showed a gang affiliation.

Defendant testified that he picked up Cartoon, meaning to take him home after talking with Tiffany. Tiffany wanted an abortion and wanted to reunite with defendant. After their talk the day of the shooting, she walked him to his car, hugged him and said goodbye. He drove south and made a U-turn when he saw and heard Tiffany arguing with two people. He parked across the street from her home, and Tiffany came to the car. She said she was arguing with "'Nobody.'" Defendant said he would return after dropping off Cartoon. Tiffany seemed upset. Defendant drove off. He turned onto the street where the shooting occurred but did not stop. He drove to Jack-in-the-Box for food and then took Cartoon home. Defendant went home.

When they arrived at his home, the police asked defendant if he had been at Tiffany's home 15 minutes earlier. He said, "'No,'" because he was there half an hour earlier. He had "'L.A'" tattooed on his arm because he was born in Los Angeles. He was not a Pacoima Crazy Boys member. He never told a third gang detective, who had completed a field interview card, that he was a Pacoima Crazy Boys member.

Defendant's father testified that defendant left the house sometime on the night of the shooting and returned at 8:30 p.m. Defendant acted normally. Defendant's mother testified the police arrived around 11:00 p.m. After the search, they showed her a bullet. She had found it cleaning offices and given it to defendant, who kept it in a jar near his bed, among pennies. Defendant was sad when he learned Tiffany's baby was not his. He never said anything about Jason. Defendant's employer, owner of a pool cleaning business, testified defendant was a good worker and never caused any trouble. The employer's son had been identified as a gang member, but his father did not believe he was. Police officers had searched the employer's home and found a gun they claimed belonged to his son. Defendant's soccer coach testified defendant had played on his team since he was 15 or 16. (Defendant was 18 on the night of the shooting.) He was an excellent player. As he understood it, gang members do not play soccer because they must undergo a background check before being allowed to play.

A deputy testified he responded to the scene and interviewed Jason and Jesse. Jason said that after his argument with Tiffany, he saw her go to a car parked in front of her house. The car started up, went past Jason, made a U-turn, and passed him again. Jesse said he heard three shots and did not mention hearing bullets travel by his head.

DISCUSSION

I

Defendant claims the evidence was insufficient to support a finding that he knew and shared Cartoon's intent to kill both Jason and Jesse, and that he knew Cartoon was armed. We disagree.

On review of a claim of insufficient evidence, our task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh evidence, and witness credibility and the weight to be given the evidence are exclusively within the province of the trier of fact. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) The testimony of a single witness, if believed by the jury, is sufficient to establish any fact about which the witness testifies. (CALJIC No. 2.27; *People v. Pringle* (1986) 177 Cal.App.3d 785, 788-789, disapproved on other grounds in *People v. Gammage* (1992) 2 Cal.4th 693, 701, 702.)

Defendant was tried as an aider and abettor. An aider and abettor is one who, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aid, promotes, encourages or instigates, the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) When, as here, the crime at issue

requires a specific intent, to be guilty as an aider and abettor, one "'must share the specific intent of the [direct] perpetrator[.]'" He must "'know [] the full extent of the [direct] perpetrator's criminal purpose and [must] give [] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' [Citation.] Thus, to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing -- which means that the person guilty of attempted murder as an aider and abettor must intend to kill. [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 624.) "[F]elonious . . . intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.]" (*People v. Matson* (1974) 13 Cal.3d 35, 41.)

Defendant, upset by the recent news that he was not the father of Tiffany's baby, did not speak to her for three days. On the night of the shooting, he and Cartoon went to her house. Defendant and Tiffany spoke; she suggested an abortion. Defendant disapproved, and they argued. Defendant drove off southbound, Cartoon still in the passenger seat. Defendant saw Tiffany arguing with two people. He made a U-turn and returned to her house. He and Tiffany spoke and she finally said she had been talking with Jason. (Tiffany had told defendant that Jason was the baby's father.) Tiffany was upset and angry. Defendant said he would return and drove off northbound, the same direction in which Jason and Jesse were walking. Defendant turned onto the same side street Jason and Jesse had just crossed and pulled up behind them as they walked side by side, parking the Altima in the middle of the street. Cartoon jumped out of the car and fired several shots at Jason and Jesse.

Other relevant evidence was provided by expert testimony. When a gang-style shooting is done by a car's passenger, the driver usually knows what is going to occur and is expected to drive the shooter safely away after the shooting. Cartoon was a

member of the Pacoima Crazy Boys and defendant admitted to being a gang member and bore tattoos signaling gang membership.

The situation involving Tiffany, Jason and defendant was emotionally charged. On learning it was Jason with whom he had just seen Tiffany arguing, defendant followed Jason and Jesse and stopped the car behind them in the middle of the street just past the intersection they had just crossed. He did nothing to prevent the shooting, and drove Cartoon away after the shooting. Defendant lied to the police to protect Cartoon.

Contrary to defendant's assertion, the circumstantial and expert evidence was sufficient to support the inference that defendant and Cartoon communicated before the shooting and that defendant knew Cartoon had a gun and intended to kill Jason and Jesse. The jurors were entitled to ask themselves, for example, why defendant positioned the car so as to ambush Jason and Jesse, walking side by side, if he did not know Cartoon had a gun and intended to kill both men. The evidence also supported the inference that defendant and Cartoon talked about what they were going to do. Substantial evidence established defendant shared Cartoon's intent to kill both men and knew Cartoon was armed.

II

Defendant says the evidence was insufficient to support his convictions on counts 3 and 4 because the prosecution failed to prove he knew Cartoon's criminal purpose was to assault someone with a deadly weapon. Contrary to defendant's claim, the evidence set forth in part I above was sufficient to support the inference that defendant knew Cartoon had a gun.

III

Defendant contends the evidence was insufficient to support his conviction for the attempted murder of Jesse in that no evidence showed he shared Cartoon's specific intent to kill Jesse.

On the contrary, Jason and Jesse were walking side by side when defendant pulled the car up behind them and Cartoon jumped out of the car and began shooting at them.

As noted, the evidence supported the inference that defendant knew Cartoon had a gun and that he and Cartoon decided on their course of conduct as they left Tiffany who was angry at Jason. Defendant stopped the car in an ambush position and drove Cartoon safely off after the shooting. "All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are *principals* in any crime so committed." (§ 31, italics added.) Accordingly, one who "aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

"[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. . . .'" (*People v. Bland* (2002) 28 Cal.4th 313, 329.) "'When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. . . .'" (*Id*. at p. 330.) Defendant and Cartoon created the *Bland* zone of danger. A reasonable jury could conclude that defendant "'. . . intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. . . .'" (*People v. Bland*, *supra*, 28 Cal.4th at p. 329.)

Although Jason was likely the primary target, substantial evidence supported the finding that defendant shared a concurrent intent to kill Jesse, too.

IV

We reject defendant's claim that the jury instructions were erroneous because they failed to inform the jury that to be convicted of two counts of attempted murder, he had to share in Cartoon's specific intent to kill two separate victims.

Defendant says that the use of "another" in CALJIC No. 8.66 -- the pattern form of which was given to the jury -- created a reasonable likelihood the jury misunderstood and misapplied the instruction. (*People v. Avena* (1996) 13 Cal.4th 394, 417.)[3] He says "another" could have meant just one person, meaning the jury could have found him guilty of both attempts even if the panel believed he intended harm to only one victim.

Defendant claims the language in CALJIC No. 3.01 does not resolve to whom the word "another" refers in No. 8.66. He says No. 3.01's requirement that an aider and abettor have "knowledge of the unlawful purpose of the perpetrator" is ambiguous because, in conjunction with No. 8.66's use of "another," it requires only that defendant

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3 CALJIC No. 8.66, as given, provided: "[Defendant is accused [in Count[s] 1 and 2] of having committed the crime of attempted murder, in violation of Sections 664 and 186 of the Penal Code.] [¶] Every person who attempts to murder another human being is guilty of a violation of Penal Code Sections 664 and 187. [¶] Murder is the unlawful killing of a human being with malice aforethought. [¶] In order to prove attempted murder, each of the following elements must be proved; [¶] 1. A direct but ineffectual act was done by one person towards killing *another* human being; and [¶] 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully *another* human being. [¶] In deciding whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the killing or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to kill another person will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to kill. The acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstances not intended in the original design." (Italics added to show the words defendant claims are erroneous.)

have knowledge Cartoon was going to kill someone, not necessarily a particular victim.[4] There was, says defendant, "a reasonable likelihood the instructional error affected this jury because it did not require that the jury find a specific intent to kill with respect to each particular victim and could have been understood as transferring intent from any one person to both persons."

On the contrary, the attempted murder counts were charged separately and named the victims separately, and the court read the information to the jury. In his opening statement, the prosecutor explained that defendant was charged with two counts of attempted murder, "[o]ne on Jason Miranda, one of Jess[]e Ponce both as victims."The jury instructions repeatedly referred to counts 1 and 2. The jury was given individual verdict forms for each of the four counts. One attempted murder verdict form named Jason as victim, the other named Jesse.

The court also instructed the jury that as to the crimes charged in counts 1 and 2, unless the requisite specific intent "exists the crime . . . to which it relates is not committed . . . ." (CALJIC No. 3.31)

Accordingly, the jury was made fully aware that it must determine whether defendant shared Cartoon's specific intent to kill both Jason and Jesse. The instructions were not ambiguous. In common English usage, the words "another human being" in CALJIC No. 8.66 refer simply to someone other than the direct perpetrator or, in this case, the aider and abettor. No. 3.01 clarified the requirement of a finding that defendant specifically intended the attempted murders. No. 3.31 made clear that the requisite intent had to be found on each crime in order to convict. Taken as a whole, the jury instructions, reinforced by other factors such as the multiple, separate charges and verdict forms, adequately conveyed to the jury that in order to convict on two counts of

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4 As relevant, CALJIC No. 3.01 reads: "A person aids and abets the [commission] or [attempted commission] of a crime when he or she, [¶] 1. With knowledge of the unlawful purpose of the perpetrator and [¶] 2. With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] 3. By act or advice aids, promotes, encourages or instigates the commission of the crime."

attempted murder, defendant had to share the shooter's specific intent to kill two separate victims.

V

Defendant says he was denied effective assistance of counsel because his lawyer, out of demonstrated ignorance of the law concerning the requisite intent required to convict defendant, allowed "erroneous and/or inadequate" jury instructions to be given and failed to request "clarifying and amplifying instructions on intent." His argument is premised on his earlier claim (see part IV, *supra*) that the jury instructions were erroneous or inadequate and there was insufficient evidence to establish he knew and shared Cartoon's specific intent to kill Jesse. Because we already have ruled the jury instructions adequately described the prosecution's burden to show that defendant shared Cartoon's intent to kill both Jason and Jesse and that substantial evidence established that defendant knew and shared Cartoon's specific intent, we need not addess this claim.

VI

Defendant claims, and respondent agrees, that the minute order on restitution should be corrected to conform to the trial court's oral pronouncement. Respondent also points out that the abstract of judgment should be modified to reflect the victim restitution order.

At the sentencing hearing, the court ordered defendant to pay "a $1200 restitution fine pursuant to [section] 1202.4, a $1200 parole-revocation fee pursuant to [section] 1202.45 . . . . [¶] He's ordered to report to his parole officer within 48 hours of his release, also ordered to make restitution to the victim in this matter for the cost of the medical care that was prompted by this action. [¶] . . . [¶] . . . If the medical insurance paid the bill, then they can perhaps go after your client in a civil or other judgment proceedings. However, I am not saying that your client has to pay this if it was already paid and they haven't gone after him. But, out of an abundance of caution, I am ordering restitution to the victim . . . [¶] . . . [¶] Mr. Ponce. And [defendant] certainly has a right

to have a hearing to make that determination. If it's already been paid, then he doesn't have to worry about it."

The minute order reads: "Defendant is ordered to pay restitution to the victim, Jesse Ponce, in an amount and manner as prescribed by the parole officer." The court did not mention that the amount of the direct victim restitution was to be determined by defendant's parole officer. The abstract of judgment does not mention the direct victim restitution ordered.

Accordingly, the minute order and the abstract of judgment should be corrected to reflect the court's oral pronouncement (*People v. Rowland* (1988) 206 Cal.App.3d 119, 123-124 ; see *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187) that defendant should pay direct victim restitution in the amount equal to the medical expenses incurred by Ponce.

DISPOSITION

The matter is remanded so that the trial court may correct the January 21, 2003, minute order to reflect the court's oral pronouncement of its restitution order: that defendant pay victim restitution in the amount equal to the medical expenses incurred by Ponce. The trial court also is directed to correct the abstract of judgment to reflect its victim restitution order and to forward the corrected abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J. MALLANO, J.